No. 15,335

United States Court of Appeals

For the Ninth Circuit

THE CANADIAN INDEMNITY COMPANY, a corporation,

Appellant,

vs.

OHIO FARMERS INDEMNITY COMPANY, a corporation, PRUDENTIAL ASSURANCE COMPANY LIMITED OF LONDON, and all other underwriters at Lloyd's London subscribing to Lloyd's Policy No. EB32914-C,

Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF OF APPELLEE OHIO FARMERS INDEMNITY COMPANY.

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BRIEF OF APPELLEE OHIO FARMERS INDEMNITY COMPANY.

Appellee, OHIO FARMERS INDEMNITY COMPANY (hereinafter referred to as "Ohio" to distinguish it from appellee, PRUDENTIAL ASSURANCE COMPANY LIMITED OF LONDON) faces a dilemma in responding to appellant's brief.

For reasons known only to appellant, the printed transcript of record designated by it does not contain the evidenciary basis upon which its argument is based that the Christiansen verdict and judgment was rendered under the doctrine of *respondeat superior.*

The printed transcript of record does not contain the testimony of Earl Correia to which appellant refers, or the testimony of Clifton Land, to which appellant also adverts. It is also silent as to the forms of verdict submitted to the jury in the trial of the Superior Court action in Alameda County and on which the Christiansen judgment was rendered and which demonstrates the issues which the court in that case found present. Similarly and directly connected with the omission of the forms of verdict is an omission of the instructions of the Alameda Superior Court to the jury upon the various issues apart from *respondeat superior* which the court gave to the jury as appropriate law for guidance in its deliberation for a verdict.

Under Section 608 of the *Code of Civil Procedure* of the State of California, it is the duty of the court in charging the jury to state all matters of law which it thinks necessary for their information in giving their verdict. The trial court observed the mandate of Section 608 of the *Code of Civil Procedure,* but appellant prefers to omit from the printed transcript of record all these cogent instructions and forms of verdict which were evidenciary exhibits before the district court and formed the basis for Judge Hamlin's decision.

It may be stated further that in the Alameda County Superior Court action the jury is presumed to have followed the instructions of the court.

Thus, appellant asserts error in the judgment heretofore rendered by the District Court without bringing before this court the evidence upon which Judge Hamlin's decision was based. It is not the appellant's choice to ignore the rules of this court, and appellee Ohio assumes that Rule 17 will be enforced, and that matters beyond the printed transcript at record will not be considered by this court.

Pursuant to Rule 17 of this court, the appeal should be dismissed and the arguments of appellant based on the testimony of Land and Correia discussed in appellant's brief, pages 20-25, should be disregarded.

Such reference to matters outside the record warrant dismissal.

On the other hand, if appellee Ohio respects the rules set forth by this court and yet this court should disregard its rules on appeal to permit reception of appellant's contentions based on matters outside the record, appellee would not be afforded an opportunity to answer the appellant's contents received by this court despite the basis of matters extraneous to the transcript of record.

Prudence does require in anticipation that this court cannot strike from the appellant's brief its attempt to re-try not only the factual issues decided in the District Court, but also those determined in the

Alameda Superior Court jury trial that appellee Ohio reply to appellant.

Before doing so, and, since appellant seeks to reverse the District Court decision, it should be recalled that the printed transcript omits any statement of the actual evidence before Judge Hamlin below, insofar as mention was made before him of the issues and evidence in support thereof which in turn were previously before the Alameda Superior Court.

Therefore this court is asked to review findings, conclusions and judgment, without having before it the evidence upon which the decision and judgment was based.

THE QUESTION PRESENTED.

The real question presented in this appeal is whether or not the findings of the District Court and the conclusions of law based thereon, which formed the basis of the judgment sought to be reversed was supported by the evidence before the District Court.

As this appellee has said, the designation of the record by the appellant reflects no ground for reversal set forth in it.

As to the specifications of error assigned and in the alternative in the event this court will consider argument of the appellant based on material not present in the record designated by it, as this appellee has pointed out, it is submitted that the District Court did not err.

REPLY TO SPECIFICATIONS OF ERROR.

1. As to the first specification of error that the court erred in finding a fact No. 4 (R. 50) on the basis of not having a Superior Court record that presented evidence to support a verdict against Louis Stores, Inc. upon the basis of "independent negligence."

In the first place the entire record of the Alameda Superior Court trial was not before the District Court.

The appellant was plaintiff below, and failed to fulfill its burden in proving its case by providing such record of the Alameda County proceedings, if any, which may have supported its allegations for declaratory relief. Now, without referring to the instructions on forms of verdict in evidence below in the District Court, appellant would seek reversal of the findings which are based on the actual evidence before the trial court, but not produced in the printed transcript of record.

The Christiansen judgment was rendered on a complaint which alleged (R. 35) in Paragraph VIII:

> "At said time and place defendants, and each of them, so carelessly and negligently operated, maintained and controlled said market and said grocery department therein and said aisle open to the public therein so as to cause and permit a cardboard carton to be in said aisle in said grocery department in such manner so as to render said aisle dangerous to the passage of customers and business invitees in said market and said grocery department thereof lawfully using said aisle."

Paragraph IX (R. 35) alleges the proximate result of the negligence alleged in paragraph VIII:

> "As a direct and proximate result of said carelessness and negligence of defendants, and each of them, as aforesaid, plaintiff was caused to trip and fall over said cardboard carton in said aisle and as a direct and proximate result of said fall in said aisle as aforesaid plaintiff received the injuries and damages hereinafter set forth."

It is true that in paragraph V (R. 34) of the amended complaint, Correia and Land are alleged to be agents and employees of Louis Stores, Inc. but it is obvious that whatever dereliction is alleged to be the proximate cause of Mrs. Christensen's accident, it was the negligent operation, maintenance and control of the said market and said grocery department therein, which is alleged as that cause and the allegations of the complaint therefore are not framed on a theory of *respondeat superior.*

In the course of trial a nonsuit was rendered for the defendant Piperis, leaving to the jury the determination of liability of the defendants Louis Stores, Inc., Earl Correia and Clifton Land. The verdict found Land guilty of negligence as well as Louis Stores, Inc. and we submit that from uncontradicted testimony that Land's conduct, as the evidence reflects, was simply to follow the instructions of his employer and codefendant Louis Stores, Inc.

It is submitted that the appellant in this case had the burden of establishing by a preponderance of the evidence that the only basis of liability for Louis

Stores, Inc., was on a basis of *respondeat superior,* that Louis Stores, Inc. was guilty of no act of negligence whatsoever, and that the unauthorized act of its servant Land was the only negligence in the entire case. The appellant did not maintain this burden because the evidence is to the contrary.

Referring to the challenged finding, appellant makes no mention of the evidence considered by the District Court as a basis for its finding. For instance, the trial Court in its decision (R. 44) states:

> "From the evidence presented, the court is unable to say that the finding of *respondeat superior* was the only finding that could have been made. The jury may have found Louis Stores Inc. negligent in not providing enough employees or in not properly instructing its employees what to do. THERE WAS ENOUGH EVIDENCE UPON WHICH TO BASE SUCH A FINDING and the jury were instructed that they could return a verdict against Louis Stores, Inc. and not against Land. The evidence at the trial could not remove the possibility that the jury made a finding that each defendant was independently negligent."

In the findings (R. 48) the trial court found:

> "Said amended complaint alleged that said Virginia Christensen suffered personal injuries on September 17, 1954 while shopping in a store operated by defendant Louis Stores, Inc. that DEFENDANTS AND EACH OF THEM SO CARELESSLY AND NEGLIGENTLY OPERATED, MAINTAINED AND CONTROLLED SAID MARKET AND SAID GROCERY DEPARTMENT * * *."

And further (R. 49):

> "The court instructed the jury in said action on the doctrine of respondeat superior and also instructed the jury that they could find a verdict against Louis Stores, Inc. and not against its employee, Clifton Land. THE COURT ALSO GAVE TO THE JURY IN SAID ACTION A FORM OF VERDICT WHICH FOUND IN FAVOR OF PLAINTIFF VIRGINIA CHRISTENSEN AND AGAINST DEFENDANT LOUIS STORES, INC., AND WHICH FURTHER FOUND IN FAVOR OF DEFENDANT CLIFTON LAND."

As we have mentioned, the appellant has not presented to this Court in the printed transcript of record the evidence of the instructions or the forms of verdict which were before the District Court and upon which the foregoing findings were based.

Appellant, to the contrary, devotes half its argument, commencing at page 20 of appellant's brief, to a contention that there was only a question of *respondeat superior* before the Alameda Superior Court, which the District Court has found to be not so, and that such was the only question presented to the District Court itself.

THE DOCTRINE OF RESPONDEAT SUPERIOR.

Examining the argument of appellant, let it be stated that no one in this litigation from its inception has ever questioned the elementary concept of that doctrine.

No purpose is served, however, by the citation by appellant on page 20 of his brief (II A.) of *Canadian Indemnity Company v. U. S. F. & G.,* 213 F. (2d) 658, affirming *U. S. F. & G. v. Canadian Indemnity Company,* 107 F. Supp. 683. These cases have no relation to the controversy involved here. There was never any question in either of the cited cases that the doctrine of *respondeat superior* was the sole question involved. As Judge Murphy stated in *U. S. F. & G. v. Canadian Indemnity Company,* 107 F. Supp. 683, at page 685:

> "The pleadings were drawn, the case tried and PROPOSED VERDICTS FRAMED upon the theory that Thomas Goff, while acting in the scope of his employment of Hedrick & Brown, negligently caused the injury." (Emphasis ours.)

Respondeat superior is the doctrine of law wherein a principal becomes liable for the torts of an agent while acting within the scope of employment, even though contrary to instructions. The culpable act of the agent is unauthorized and public policy imputes liability to the principal.

Civil Code, 2838; *Restatement of Agency,* Sections 209, 243, et seq.

THE DOCTRINE OF QUI FACIT PER ALIUM FACIT PER SE.

However, apart from the imputation of liability, a principal may also become liable for the act of a serv-

ant when the act is the result of express direction of the principal. This familiar doctrine of law is epitomized in the legal maxim, *qui facit per alium facit per se.* As the California District Court states in *Maberto v. Wolf,* 106 Cal. App. 202, at p. 206:

> " 'The principle *qui facit (per alium facit per se)* must not be confounded with that of *respondeat superior.* It is a common misconception to attribute the liability of a master for the delicts of his servant in every case to the principle of *respondeat superior.* The servant may cause injury in doing the very thing that the master directs him to do. In that case the master is held liable because the law holds that the act is that of the master although done through the servant, under the principle *qui facit per alium facit per se.* He is therefore held responsible for his own act. But, on the other hand, the servant may cause an injury while engaged within the line or scope of his employment in doing an act which the master has not directed him to do or has specifically directed him not to do. It is the act of the servant, not the master, and the latter is held responsible on grounds of public policy; the liability in such case being expressed by the phrase *respondeat superior.* The principle is entirely distinct from that of *qui facit* and owes its origin to an entirely different source; the one to public policy and the other to the fixed principle of law and justice.' "

The uncontradicted testimony of Clifton Land demonstrates that his actions were in direct obedience to the direction of his master. His was not an unauthorized act but performed pursuant to the express

direction of Louis Stores, Inc., his principal. (See plaintiff's Exhibit No. 1.)

"Q. Can you tell us how that box got there?

A. Yes.

Q. How did it get there?

A. I called for it. My courtesy boy brought it out from the store room.

Q. Where were you when you called for it?

A. At the checking stand.

Q. How many customers were you taking care of at that time?

A. Several.

Q. Was this during the period after the Manager had gone home and left you there all by yourself to take care of customers?

A. Yes."

(p. 6, lines 5-14.)

"Q. You were busy waiting on customers?

A. Yes."

(p. 7, line 23.)

"Q. And then you went back up to your counter and continued to wait on this stream of customers?

A. That is correct."

(p. 9, lines 3-4.)

"Q. Mr. Land, you were not running this store, you just worked there, you didn't own it?

A. That's right.

Q. Your duties there were at the check stand after Mr. Correia left, am I correct?

A. Yes.

Q. And on this particular night you were checking customers out there when this customer asked about the Alhambra water, is that correct?

A. That's true.

Q. Your employer hires courtesy boys, Louis Stores hires them.

A. Yes.

Q. You are not the hiring or firing director of the employer?

A. I have nothing to do with it.

Q. You are just working there?

A. Yes.

Q. By the way, had Mr. Louis or any of the Louis Store people ever told you to stick at that check-out stand and attend to the customers?

A. That is our first duty.

Q. You were so instructed?

A. Yes.

Q. So far as this courtesy boy is concerned, did he not come from Louis Stores, too?

A. Yes.

Q. When you got this call for the water, you had customers at the check-out stand?

A. That is true.

Q. And you had the courtesy boy bring out the box of water?

A. That is correct.

Q. Through the direction of your directors or employer, he is not permitted to take stock out?

A. That's right.

Q. Your responsibility is that you go and take stock out?

A. When I have an opportunity.

Q. And your instruction from Louis Stores is that you stay at the check stand and check customers out and don't stock until you are free to do so?

A. That's true.

Q. And on this particular night, you followed those instructions, did you not?

A. That's true.

Q. Was this box just plain brown, or was it printed on, or what?

A. One side is white with blue letters.

Q. Everything you did that night to go and get the water was pursuant to orders of Louis Stores?

A. That's right."

(p. 11, line 6 to p. 12, line 16.)

See also the testimony of Earl Correia (plaintiff's Exhibit No. 2):

"Q. And your experience as the manager of that store had told you, had it not, that any low article in the public aisle where people shop, such as a single low box or a single can sitting out in the aisle below eye level would be a hazard to the safety of your customers?

A. That's right.

Q. You had been told that and told that, had you not, by your supervisor, Mr. Holmes?

A. That's right."

(p. 6, lines 14-20.)

"Q. Was Friday night a busier night usually than other nights?

A. Friday night is usually busier than the rest of the week."

(p. 8, lines 18 and 19.)

"Q. So that when you left about seven, there would be two hours of operation remaining with

just one clerk and one courtesy boy in charge, is that right?

A. That's right.

* * *

Q. What are the duties of a courtesy boy?

A. A courtesy boy is there to take out the groceries for customers, sweeping up, picking up boxes, etc., garbage, anything that has to be taken out, dumped out.

Q. Does a courtesy boy have anything to do with stocking merchandise on to the shelves?

A. No.

Q. As a matter of fact, is a courtesy boy permitted by you to put things up on the shelf?

A. He is not supposed to put anything up on the shelf.

Q. So that when you left the market at seven at night, the only person in the store that would be permitted by you to put anything out of a box on the shelf was this one man in charge of the store?

A. That's right.

* * *

Q. Was your usual custom to stock shelves with one man on duty?

A. Not normally. If he wasn't busy, he would stock.

Q. Had you not instructed this one man that if there were no customers there to wait on, that he could stock merchandise, but he was supposed to take a box and put the entire contents of the box on the shelf and then have the courtesy boy remove the empty box from the aisle?

A. Normally, yes.

Q. Your instructions to the one man in charge there was, if he had a box in the aisle, to stock the shelf he was working on until he had the box empty, and then get the box out of the aisle?

A. That's true."

(p. 9, lines 1-3, 16-26, p. 10, lines, 1-16.)

The Court should bear in mind counsel for the appellee who also appeared in the Alameda Superior Court action for Louis Stores, Inc., introduced no testimony concerning the instructions given to its employees by his client and it may well be inferred through the absence thereof that counsel well knew that Land at all times was fulfilling the direct instructions of his employer. Land's paramount instruction was to remain at the cash register and check-out station when customers were present and not to stock groceries until he had free time to do so.

The attention of the Court is directed to a clerical error in the plaintiff's request for admissions referring to an instruction appearing at lines 9 to 24 of page 3 of the Request for Admissions.

Actually, as given by the Court, the instruction read as follows:

"If you find from the evidence that any employee of defendant LOUIS STORES, INC., including either of the defendant employees, EARL CORREIA or CLIFTON LAND, was negligent while acting in the course and scope of his employment for said LOUIS STORES, INC., you are instructed that you must impute the negli-

gence of said defendant employee or employees to defendant LOUIS STORES, INC., and that if you find from the evidence that plaintiff is entitled to a verdict under the instructions given to you by the Court, such verdict should be rendered against defendant LOUIS STORES, INC., and such defendant employee or defendant employees if any found by you to be negligent."

If the evidence in the Christensen trial demonstrated the negligence of Louis Stores, Inc. to be only that imputed under the doctrine of *respondeat superior,* there would have been no need for this instruction, leaving to the jury as a question of fact whether or not Correia or Land was negligent or was engaged in the course and scope of his employment with a subsequent imputation of liability to the principal if the jury found affirmatively on both questions. If *respondeat superior* was clearly established, the Court would have instructed Correia or Land were in the course and scope of their employment and that imputation of liability must follow if either or both were found to be negligent.

Of course, this instruction referred to by plaintiff was only one of the many given by the Court after duly considering all the evidence in the case.

The jury was also instructed:

"Defendant Land's Proposed Instruction No.....

"You may find a verdict in this case against the defendant Louis Stores, Inc., and not necessarily against the defendant Land, who at all times com-

plained of was the servant of the master Louis Stores, Inc. If you find that the defendant Land was acting at all times under the direction, express or implied, of his master Louis Stores, Inc., then his actions were those of his master, even though performed by the servant."

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"Court's Instruction

"However, such fact would not excuse either defendant Land or Correia from liability to plaintiff for an act or omission of his, amounting to negligence on his part, from which plaintiff suffered injury as a proximate result, provided plaintiff was herself free from any contributory negligence.

"Approved by all parties.

Given, Ledwich, J."
(Defendant's Exhibit B)

The jury, therefore, could have exonerated Land or Correia on the evidence in this case concerning which the Court saw fit to instruct. If there was not evidence that there was independent negligence on the part of Louis Stores, Inc., the Court could have given no such instructions for any verdict against Louis Stores, Inc. without evidence sufficient to sustain it against that defendant alone would have been a self-stultifying verdict.

See
McCullough v. Langer, 23 Cal. App. (2d) 510;
Bradley v. Rosenthal, 154 Cal. 421.

Judge Ledwich in the Alameda County Superior Court action properly instructed the jury to this effect because of the fact that the evidence showed that Louis Stores, Inc., through its policies requiring one man to handle a large busy store with paramount attention to the cash register and check-out station, was negligent in the operation and management of its premises.

That this is uncontrovertible is further evidenced by the fact that Judge Ledwich presented five forms of verdict to the jury (Plaintiff's Exhibit 3), the fifth of which read as follows:

> "We, the jury in the above entitled cause, find in favor of the Plaintiff Virginia Christensen, and against the Defendant Louis Stores, Inc., a corporation, and assess Plaintiff's damages in the sum of (blank) dollars.
>
> "We further find in favor of Defendants Earl Correia and Clifton Land."

Therefore, it must be conclusively presumed that the Superior Court properly instructed the jury (Louis Stores, Inc. has not appealed from the judgment) and that there was before the jury for its determination the question of the self-originating negligence of Louis Stores, Inc.

The mere fact that Land was held in a verdict with Louis Stores, Inc. is evidence that the jury found Louis Stores, Inc. negligent as well but it is not evidence that it so found on the basis of any imputable negligence. The verdict is entirely explainable under

the doctrine of *qui facit per alium facit per se.* Naturally, if Louis Stores, Inc. directed Land to perform his services negligently, it would not exonerate Land but it would not mean that Louis Stores, Inc. was solely responsible on a basis of imputed liability.

In appellant's argument, commencing at page 20 (II B) it is argued that *respondeat superior* was the only basis of a judgment heretofore found in the Superior Court action in Alameda County. Appellant argues on page 21 that it was Land who actually caused and permitted the box to be in the aisle way, but overlooks entirely the testimony (supra) concerning the directions of Louis Stores, Inc. that Land stay at the cash register when customers were present. It also, on the same page, mentioned that the jury was instructed on the doctrine of *respondeat superior,* but, again, omits any mention of the instruction based on the doctrine of *qui facit per alium facit per se* which was before the Superior Court as well as the District Court, and the forms of verdicts based thereupon.

The citation of *Pleasant Valley Association v. California Farm Insurance Company,* 142 Cal. App. (2d) 126, does not assist appellant. The action itself was one for declaratory relief and the controversy between the companies arose over an untried law suit entitled *Nungaray v. Pleasant Valley and Croker* (see 142 Cal. App. (2d), page 130.)

The determination that only a *respondeat superior* question was presented was based on the pleading which was much like the *Canadian Indemnity v. U. S. F. & G.* case (supra). It is readily distinguishable

from the Christensen case tried in Alameda County for the reason that the evidence upon which the verdict was based presented another basis of liability on the part of Louis Stores, Inc. than *respondeat superior.*

That Correia was exonerated by the jury is urged by appellant (Appellant's brief, pp. 23-24) as a reason why the Christensen judgment was based solely upon *respondeat superior.* It is difficult to follow the reasoning of appellant in this regard. In the first place, it disregards entirely the testimony of Clifton Land. Secondly, it disregards that Correia was absent from the premises at the time of this accident, having completed his day's work. It overlooks further the knowledge of Louis Stores, Inc. which allowed (plaintiff's Exhibit II, lines 9 and 10) only one clerk and one courtesy boy in the store with the courtesy boy not permitted to stock merchandise on one of their busy nights, with the clerk to stock shelves only if he was not busy at the cash register.

Regardless of the jury finding on Correia, which is explainable by his absence from the premises which had no box in the aisle at his time of departure, the fact was that Louis Stores, Inc. was negligent in not assigning sufficient personnel on its busiest night on this occasion in requiring its sole employee to remain at the check counter to wait on customers and only to remove merchandise from the aisles in the event that he was not busy. This presents a perfect example of the application of the doctrine of *qui facit per*

alium facit per se. In the final argument on this question contained in appellant's argument (II C) it is contended that the obvious negligence of Louis Stores, Inc. was "passive" and that Land alone was actively negligent.

If this Court will refer to the testimony of Clifton Land, supra, pp. 10-13, the conclusion is inescapable that on this night he was busy waiting on customers and his duties were at the check stand after Mr. Correia left. That he does not hire courtesy boys, that he ordered the courtesy boy to bring the box of water. That his instructions from Louis Stores, Inc. were to stay at the check stand and not stock until he was free to do so, and on this night he followed that instruction.

The Court very properly instructed in the Alameda County action:

> "If you find that the defendant Land was acting at all times under the direction, express or implied, of his master Louis Stores, Inc., then his actions were those of his master, even though performed by the servant.
>
> "QUI FACIT PER ALIUM FACIT PER SE.
>
> "Court's Instruction
>
> "However, such fact would not excuse either defendant Land or Correia from liability to plaintiff for an act or omission of his, amounting to negligence on his part, from which plaintiff suffered injury as a proximate result, provided plaintiff was herself free from any contributory negligence."

The situation is not at all in keeping with that mentioned in the case of *American President Lines, Ltd. v. Marine Terminals Corporation,* 234 Fed. (2d) 753.

The Court, in that decision, stated that it preferred not to rest its decision upon the ground that the negligence of American President Lines, Ltd. was passive, but it does point out that in this cited case, Marine Terminals Corporation, by contract, had undertaken to handle the beams involved as part of its duties. It also recites that there has been a complete disclosure to Marine Terminals that the beams were not equipped with locking devices. The decision was actually based solely upon the fact that regardless of the negligence of American President Lines, Marine Terminals had been completely instructed concerning the defects and that it was its failure to prudently handle the defective beams that was the active negligence present. It is noteworthy that in that decision the Court discusses a previous holding in *U. S. v. Rothchild International Stevedoring Company,* 183 Fed. (2d) 181, where an identical situation involving a defective winch, the details of which were completely related to the Stevedoring Company, resulted in a similar accident. In such a situation, one may well distinguish between passive and active negligence. Significantly, that position is not present for the appellant to make a similar contention in this case. The attention of the Court is directed to Section 441, *Restatement of Torts,* Subdivision b, which reads as follows:

> "b. 'Active' and 'passive' negligence. The cases in which the effect of the operation of an intervening force may be important in determining whether the negligent actor is liable for another's harm are usually, although not exclusively, cases in which the actor's negligence has created a situation harmless unless something further occurs, but capable of being made dangerous by the operation of some new force and in which the intervening force makes a potentially dangerous situation injurious. In such cases the actor's negligence is often called passive negligence, while the third person's negligence, which sets the intervening force in active operation, is called active negligence."

It is submitted that the negligence of Louis Stores, Inc., in not providing sufficient personnel, in requiring the clerk to pay paramount attention to the cash register and not to the safety of invitees in this store was not negligence creating a situation harmless unless something further occurs, but capable of being made dangerous by the operation of some new force in which the intervening force makes a potentially dangerous situation injurious.

The situation in so far as Mrs. Christensen's injury was caused by independent negligence of Louis Stores, Inc. which was an issue presented to the jury of the trial Court under appropriate instructions and forms of verdict might well be described in the language of *Lacey v. P. G. & E.*, 220 Cal. 97, at page 98:

> "The authorities in this State hold that where the original negligence continues and exists up to the time of the injury, the concurrent negligent act of a third person causing the injury will not be regarded as an independent act of negligence, but the two concurring acts of negligence will be held to be the proximate cause of the injury. * * *"

See also

Mecchi v. Lyon Van & Storage Co., 38 Cal. App. (2d) at 674.

What we have said here we believe disposes effectively of the contention of error specified on page 9 of appellant's brief and further specified as (1), (4) and (5).

APPELLEE DID NOT INSURE CLIFTON LAND.

Appellant attacks in his specifications of error the finding of the District Court No. VI (R. 51). The Court found therein that the Ohio Farmers policy did not insure Clifton Land and in its Conclusion of Law No. II so stated.

In seeking to reverse the finding of the District Court, appellant seeks to usurp the position of Louis Stores, Inc. in contending that the policy should be interpreted to include actual insurance coverage for Clifton Land under Endorsement No. 4.

It must be borne in mind that Louis Stores, Inc. has not been a party to any of this litigation. It has

raised no question whatsoever concerning its endorsement. Applicant is an entire stranger to the contract of insurance between Louis Stores, Inc. and appellee Ohio.

Appellant's counsel, while he did represent Louis Stores, Inc. in the Alameda County action (along with Thomas Piperis, another insured of Canadian Indemnity (see R. 37), never represented Louis Stores, Inc. in any personal representation.

Appellant seeks to find ambiguities in this endorsement, none of which complaint is voiced by the insured, Louis Stores, Inc., and none of which has ever been raised by Clifton Land who benefited by this supplemental agreement which provided a defense of the lawsuit against him.

APPELLANT IS A STRANGER TO THE INSTRUMENT.

The appellant had its own policy with Louis Stores, Inc. and was paid a premium for it with limits of $100,000.00. It cannot contend that because of such contractual relationship with Louis Stores, Inc. that it is in a position to attack endorsement No. 4 or any other part of appellee Ohio's policy with which Louis Stores, Inc. is entirely satisfied. Louis Stores, Inc. finds no ambiguity in the policy and Louis Stores, Inc. alone would have the right to raise such an issue if it in fact existed.

We are concerned only with the relationship of the appellee Ohio's policy and the Canadian Indemnity

Insurance Company policy. Whatever provisions of Ohio Farmers Indemnity Company policy through endorsement No. 4 concerning defense of employees exist, such are not pertinent to this controversy which involves only the relationship of the two carriers for liability incurred by Louis Stores, Inc. So far as Canadian Indemnity is concerned, it insured Louis Stores, Inc. for a limit of $100,000 with an "other insurance clause" which reads as follows:

> "OTHER INSURANCE. If at the time of an accident there is any other insurance available to the insured (in this or any other carrier) there shall be no insurance afforded hereunder as respects such accident except that if the applicable limit of liability of this policy is in excess of the applicable limit provided by the other insurance available to the insured this policy shall afford excess insurance over and above such other insurance in an amount sufficient to afford the insured a combined limit of liability equal to the applicable limit of liability afforded by this policy."

The Ohio Farmers Indemnity policy similarly insured Louis Stores, Inc. with a limit of $10,000 and it contains an "other insurance clause" which reads as follows:

> "OTHER INSURANCE. If the insured has other insurance against a loss covered by this policy the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the Declaration bears to the total applicable limit of liability of all valid and collectible insurance against such loss;"

These "escape clauses" are mutually repugnant and on well established case law must be read together and construed as pro rating proportionately the respective limits of liability. This has been established without question by such cases as *Employers Liability Corporation v. Pacific Employers Insurance Company,* 102 Cal. App. (2d) 188 and *Air Transport Manufacturing Company v. Employers Liability Assurance Corporation,* 91 Cal. App. (2d) 129.

See also:

Oregon Mutual Insurance Company v. United States Fidelity & Guaranty Company, 195 Fed. (2d) 958.

Appellant can not be heard to urge an ambiguity where none exists. Because appellant is a stranger to the policy, the rule expressed in *American Lumbermen's Mutual Casualty Company v. Trask,* 266 N.Y.S. 1 (affirmed 191 Northeastern 557) should be applied. Tere the Court stated at pages 4 and 5:

> "If we were construing the policy from the standpoint of Miss Pilbeam, the assured, one of the parties to the contract, then as against the insurer, the policy would be strictly construed as to its meaning and intent". (Citations.)

The rule of strict construction against the insurance company is not, however, applicable in favor of the defendant. The plaintiff is here seeking to enforce it as against a stranger to the contract. See also *Nieschlag & Company v. Atlantic Mutual Insurance Company,* 43 Fed. Supp. 797, 799, affirmed 126 Fed. (2d) 834 (2 C.C.A.).

But, the conclusive fact is that appellant has pointed out no doubt or ambiguity in the language of the endorsement. There is, then, no ambiguity or uncertainty in the language to be *interpreted* in favor of anyone. There is no inconsistency between the endorsement and the body of Ohio's policy (Item 1). Clifton Land clearly is not an assured under either the "Definition of Insured" nor the endorsement.

Hence, as stated in *Continental Casualty Co. v. Phoenix Construction Co.,* 46 A.C. 429, 437, with reference to a similar contention:

> "An insurance company has the right to limit the coverage of a policy issued by it and when it has done so, the plain language of the limitation must be respected."

Appellant also contends that all five paragraphs of the endorsement must be given effect. Such contention presents no problem here. The construction given to the endorsement by the Court below does give effect to the whole endorsement. There is no conflict between the five paragraphs. The Court found that none of the paragraphs state or imply that Land is an assured under the policy. Paragraphs 1 and 2 are by their express language for the benefit only of the assured, Louis Stores, Inc. Paragraphs 4 and 5 refer again to the coverage of Louis Stores, Inc., as is obvious from paragraphs 1, 2 and 3 of the endorsement. Furthermore, paragraphs 4 and 5 are not involved on the facts of this case. In order to avoid any possible question on the matter, paragraph 3 expressly and

clearly provides that there is no privity of contract between Ohio and any employee of Louis Stores, Inc.

Appellant does not, of course, contend that paragraphs 1, 2, 4 and 5 expressly provide that an employee of Louis Stores, Inc. is an assured. Appellant contends that the endorsement as a whole should be so *construed.* On the other hand paragraph 3 expressly and clearly provides that an employee is not privy to the policy and shall not, by virtue of the endorsement, have any rights which he would not otherwise have had. Appellant refers to paragraph 3 as a recital. It is, however, an express, contractual provision of the policy. Appellant's contention, then, is this: Paragraphs 1, 2, 4 and 5 are not free from doubt and should be construed against Ohio in favor of appellant. Paragraph 3 is clear but is a recital. We think that, under these circumstances, appellant's present contention is completely refuted by its own quotation from II *Williston on Contracts,* page 1201, note 98, as follows:

> "If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. * * *" (Appellant's Brief, page 16.)

Endorsement No. 4 of the Ohio Farmers policy entitled "Defense of Employees" merely provides for certain supplemental coverage extended to its named insured Louis Stores, Inc.

Endorsement No. 4 consists of five paragraphs.

Paragraph 1 states that the Company will defend in the name of and on behalf of any employee upon cer-

tain notice to be made by the named insured and in certain defined instances. These instances are limited to those in which the named insured is joined or could be joined and further actions in which the Company is obligated to defend the named insured whether joined or where it could be joined.

Paragraph 2 states that the Company will make payment within the limits of the declarations in the policy of loss by liability imposed by law on any said employee but conditions payment on the same terms as recited in paragraph 1.

Paragraph 3, however, states very definitely that the policy of insurance is a contract between the Company and its named insured, that there is no privity of contract between the employee and the company and no rights are conferred upon the employee.

Paragraph 4 limits the defense even further in that it requires the act of the employee to be within the scope of his employment. In other words, this endorsement limits its application solely to instances in which he is acting in good faith in behalf of his employer.

Therefore, it must be apparent that Endorsement No. 4 not only by its title but by its content simply extends supplemental obligations to the named insured, the contracting party.

The existence of Endorsement No. 4 leaves the employee without any remedy to enforce the provisions of the endorsement. It is simply a contract for the benefit of the employer. Under the policy issued to

the named insured the Ohio Farmers Indemnity Company has full right of subrogation to the insured's rights. Thus, it could subrogate against an employee who may have caused payment to be made on behalf of the named insured in a suit against Louis Stores, Inc. alone. Because of the limitations in Endorsement No. 4 the Company could still proceed against such an employee and the employee could not assert that as an insured the Company could not take such action. Obviously if the employee was an insured under this policy there could be no right of subrogation against him. This endorsement does not make an employee an insured.

Thus, appellant confuses what is merely a supplementary and extended protection for the benefit of the named insured for extended coverage to make an insured of an employee.

The only effect of Endorsement No. 4 in the Christensen case was to require the Ohio Farmers Indemnity Company to provide a defense for Land (as well as Correia) on behalf of Louis Stores, Inc., which of course was insured not only by Ohio Farmers Indemnity Company but by the plaintiff Canadian Indemnity Insurance Company.

It would be impossible for Land to sue on the Ohio Farmers Indemnity Company policy against the Company because of the absence of privity of contract between the Company and Land. Nor could any judgment creditor of Land sue Ohio Farmers Indemnity Company pursuant to the provisions of Section

11580 of the Insurance Code of the State of California which contains mandatory provisions required of policies issued in this State, and which, among other provisions, relates:

> "(2) A provision that whenever judgment is secured against the *insured* . . . in an action based upon bodily injury, . . . then an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment." (Emphasis ours.)

To sum up, it is therefore quite apparent that Land was not an additional insured under the policy issued by Ohio Farmers Indemnity Company but merely a person for whom supplemental benefits were extended to the named insured, Louis Stores, Inc.

The Court below found that Land was not an assured under Ohio's policy based on the language of the endorsement and the applicable rules of construction. The finding and conclusion of the Court result in an equitable distribution of the loss between the two primary insurers. Appellant has shown no proper basis at all for disturbing the considered opinion of the Court below.

Appellant's attempted construction of the endorsement would not only give it a meaning not found in the language thereof but would also completely ignore the clear, express provisions of paragraph 3. The authorities cited by appellant itself refute the propriety of such construction.

CONCLUSION.

The position of the appellant is that it would rewrite the Endorsement 4 and interpose its own thinking and its own words and substituted phrases in an effort to change the plain terms of a supplementary defense agreement for the sole purpose of avoiding its own contract of insurance for Louis Stores, Inc. It has not established that appellee Ohio was an insurance carrier for Clifton Land OR, WHAT IS MORE IMPORTANT, THAT THE DISTRICT COURT CLEARLY ERRED IN ITS FINDING THAT LAND WAS NOT INSURED BY APPELLEE OHIO.

It is further contended that, as the carrier for Louis Stores, Inc., it has a right of subrogation against Clifton Land because it concludes the Alameda County verdict in the Christensen case was based solely upon the basis of *respondeat superior.*

There is no need to again recite the simple elements of the doctrine of *respondeat suprior,* but this Court must have in mind the doctrine of *qui facit per alium facit per se,* which was before the Trial Court and the District Court and which appellant ignores by omission from the printed transcript of record.

As we have heretofore remarked, this appeal should be dismissed because of the false perspective presented to this Court by such omissions from the transcript. This Court cannot be expected to reverse a judgment when the appellant has not abided by its rules on ap-

peal to present the pertinent evidence before the Trial Court below.

The printed Transcript of Record does not reflect the District Court erred.

It is submitted that the judgment should be affirmed.

Dated, San Francisco, California,
April 8, 1957.

LEO J. WALCOM,
Attorney for Appellee Ohio Farmers Indemnity Company.